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Bridget K. M. Brodie

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DAY OF RECKONING: TRUMP, THE EMOLUMENTS CLAUSES, AND PREVENTING CORRUPTION OF THE PRESIDENCY

Bridget K. M. Brodie*

I. INTRODUCTION¹

Since President Donald Trump's² election,³ there has been increased scrutiny of his alleged violation of the Foreign and Domestic Emoluments Clauses (the Clauses).⁴ In *District of*

* J.D. Candidate, May 2020, University of Baltimore School of Law; Certificate in Paralegal Studies, August 2015, Georgetown University; B.A., Philosophy and Political Science, May 2015, University of Mary Washington. To my husband, Jake—my rock, for his devotion; to my parents, whose passion for education and persistence in helping me succeed provided me the tools to get where I am today; to Professor F. Michael Higginbotham, for providing invaluable guidance and support throughout the writing process; and to the editors and staff of the *University of Baltimore Law Review*, for their commitment to the editing process: thank you.

1. While this Comment proceeded through the *University of Baltimore Law Review*'s editing process, *District of Columbia v. Trump* was reversed by the Fourth Circuit in *In re Trump* for lack of standing; the Fourth Circuit did not discuss the District Court's definition of "emolument." *In re Trump*, 928 F.3d 360, 374–80 (4th Cir. 2019) (finding that "the link between government officials' patronage of the Hotel and the Hotel's payment of profits or dividends to the President himself is simply too attenuated"), *reh'g en banc granted*, No.18-2486, 2019 WL 5212216 (4th Cir. Oct. 15, 2019). The content and argument of this Comment, however, remain relevant as it considers the novel and timely issue of the Emoluments Clauses' application to future presidents, who are likely to have significant business interests and thus, greater risk of conflicts of interests and undue influence. *See infra* Section III.B. *See generally* Manuel Castells, *The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance*, in *INTERNATIONAL COMMUNICATION* 36, 38 (Daya Kishan Thussu ed., 2010) (discussing the growth of globalization, including "global domestic politics," which allows anyone to connect and network virtually anywhere).
2. Donald Trump is the forty-fifth and current President of the United States. *Donald Trump Biography*, BIOGRAPHY (Apr. 16, 2018), <https://www.biography.com/people/donald-trump-9511238> [<https://perma.cc/FSL6-R7F6>]. Prior to taking office he was a real estate mogul and reality TV star. *Id.*
3. The official Republican candidate, Trump was elected president after defeating Democratic candidate Hillary Clinton. *Id.* President Trump's win stunned many because numerous polls and media projections favored a Clinton victory. *Id.* Despite losing the popular vote to Clinton by nearly 2.9 million votes, Trump won the majority of electoral college votes, clinching the presidency. *Id.*
4. *See* Second Amended Complaint at 1–2, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-RA),

Columbia v. Trump, the United States District Court for the District of Maryland clarified the parameters of the Clauses.⁵ In so clarifying, the court held that the Clauses apply to the Office of the President and defined “emolument” to mean “any profit, gain, or advantage.”⁶

The court’s holding calls into question whether its interpretation of the Clauses is consistent with previous interpretations and enforcement, as well as the purpose of the Clauses.⁷ If the district court’s decision stands (as it should),⁸ there could be long-lasting repercussions for future presidential candidates who have extensive private interests.⁹ The court’s decision raises the concern of whether there is consistent guidance in regard to ethical conduct in the Executive Branch, specifically regarding what will pose a conflict of interest issue under the Clauses.¹⁰

The purpose of the Clauses is to protect the presidency from any undue influence and to maintain the President’s independence.¹¹ In this relatively recent decision, the district court determined the application and scope of the Clauses in relation to the presidency for the first time in the Clauses’ history.¹² It is evident that the broad

vacated as justiciable, 939 F.3d 131 (2d Cir. 2019); see Andrew M. Harris & Daniel Flatley, *Congressional Democrats Can Sue Trump over Emoluments, Judge Says*, BLOOMBERG (Sept. 28, 2018), <https://www.bloomberg.com/news/articles/2018-09-28/congressional-democrats-can-sue-president-over-emoluments> [https://perma.cc/5N5D-BSP5]; see Ana Radelat, *Federal Court Considers Blumenthal v. Trump Case*, CONST. ACCOUNTABILITY CTR. (June 7, 2018), <https://www.theusconstitution.org/news/federal-court-considers-blumenthal-v-trump-case/> [https://perma.cc/L2PD-LVBC].

5. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 883–85, 887–98 (D. Md. 2018), *rev’d and remanded sub nom. In re Trump*, 928 F.3d 360.
6. *Id.* at 885–86, 904.
7. See discussion *infra* Sections II.A, II.C.
8. See discussion *infra* Section III.A.
9. See discussion *infra* Section III.B.
10. See discussion *infra* Section III.B.
11. See *Trump*, 315 F. Supp. 3d at 897; see also Andrew M. Harris, *What You Need to Know About the Emoluments Clause*, WASH. POST (Oct. 17, 2019, 8:45 PM), https://www.washingtonpost.com/business/what-you-need-to-know-about-the-emoluments-clause/2019/10/17/1c2f46dc-f10a-11e9-bb7e-d2026ee0c199_story.html [https://perma.cc/WRD8-J7VG].
12. See Ann E. Marimow, Jonathan O’Connell & David A. Fahrenthold, *Federal Judge Allows Emoluments Case Against Trump to Proceed*, WASH. POST (July 25, 2018, 12:20 PM), https://www.washingtonpost.com/politics/federal-judge-allows-emoluments-case-against-trump-to-proceed/2018/07/25/c8070206-8fa4-11e8-8322-b5482bf5e0f5_story.html?utm_term=.53353d012510 [https://perma.cc/M75X-PG6K].

definition of emolument, as determined by the court, brings to light discrepancies in the application and enforcement of the Clauses in regard to past presidencies.¹³ What stands out from the *Trump* decision and arguments regarding the scope and meaning of the Clauses is that while we desire that the most capable and qualified individuals run for president, that desire must be balanced against the need to prevent conflicts.¹⁴ Generally, the most qualified and capable candidates reach their positions after achieving great personal success, including the accumulation of large private business interests.¹⁵

This Comment argues that to strike the proper balance between promoting qualified presidential candidates and preventing conflicts of interest under the Clauses, the power to appoint the Director of the Office of Government Ethics (OGE Director)¹⁶ should be removed from the President and given to Congress to ensure the OGE Director is an objective and independent ethicist.¹⁷ Congressional appointment of the OGE Director is a way to effectively prevent the President from taking advantage of the appointment power by selecting an individual believed to be more inclined to treat the President favorably.¹⁸ Congressional appointment will also ensure that the Clauses' institutional purpose is acknowledged and respected: to guarantee that the President remains an independent and fair representative of the American people.¹⁹

This Comment proceeds in three parts following this introduction. Part II discusses the background and purpose of the Clauses, as well as their resurgence in *District of Columbia v. Trump*.²⁰ Part III

13. See discussion *infra* Section II.C.

14. M.C.E., *Conflicts of Interest and the President: Reviewing the State of Law in the Face of a Trump Presidency*, 4 EMORY CORP. GOVERNANCE ACCOUNTABILITY REV. 47, 59 (2017).

15. See Grant Suneson, *America's 12 Wealthiest Presidents*, 24/7 WALL ST. (Feb. 12, 2018, 6:57 PM), <https://247wallst.com/special-report/2018/02/12/americas-12-wealthiest-presidents/> [<https://perma.cc/2AFX-W65H>].

16. The OGE provides leadership and oversight of the executive ethics program and is designed to prevent and resolve conflicts of interest. *About OGE*, U.S. OFF. GOV'T ETHICS, <https://www.oge.gov/web/oge.nsf/About+OGE/> [<https://perma.cc/2LKT-6CM5>] (last visited Dec. 18, 2019).

17. See *infra* Part IV.

18. See Julia Horowitz & Cristina Alesci, *Former White House Ethics Chief Balks at Trump's Pick for Acting Director*, CNN (July 21, 2017, 2:30 PM), <https://money.cnn.com/2017/07/21/news/trump-taps-new-oge-director/index.html> [<https://perma.cc/4MQL-CSAD>].

19. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 896–97 (D. Md. 2018).

20. See *infra* Part II.

discusses the court's decision and interpretation of the Clauses in *Trump*.²¹ Part III also proposes a solution to provide future presidents with more consistent ethical guidance as to what poses a constitutionally problematic conflict of interest.²² Part IV analyzes the proffered solution of moving the power to appoint the OGE Director from the President to Congress, and why such a solution helps to guarantee a balance of promoting qualified presidential candidates while also preventing conflicts of interest and undue influence.²³ Part IV concludes by explaining why congressional appointment does not present any separation of powers concerns.²⁴ Rather, congressional appointment of the OGE Director will further strengthen the integrity of the nation's highest office by guaranteeing the President's independence as the leader of the free world.²⁵

II. THE EMOLUMENTS CLAUSES AND THEIR RESURGENCE

A. *Purpose and Background*

The Foreign Emoluments Clause states that “no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”²⁶ The Domestic Emoluments Clause states that “[t]he President shall . . . receive for his Services, a compensation . . . during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.”²⁷ The Founding Fathers instituted these Clauses as anti-corruption measures, believing that the President should be independent and protected from undue influence.²⁸ Although the Clauses are a hotly contested issue during the Trump presidency,

21. See *infra* Part III.

22. See *infra* Part III.

23. See *infra* Part IV.

24. See *infra* Section IV.B.

25. See *infra* Part IV.

26. U.S. CONST. art. I, § 9, cl. 8.

27. U.S. CONST. art. II, § 1, cl. 7.

28. See Harris, *supra* note 11; see also *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 897 (D. Md. 2018). “[The President] can, of course, have no pecuniary inducement to renounce, or desert, the independence intended for him by the constitution.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 544 (Boston, Hilliard, Gray & Co.; Cambridge, Brown, Shattuck & Co. 1833) (ebook).

there is a general lack of precedent interpreting them.²⁹ In fact, the Clauses have remained largely untouched in their two hundred year history, and no federal cases have provided a robust discussion of the scope of the Foreign Emoluments Clause or its application to the President.³⁰

The Clauses have been generally overlooked because most presidents either liquidate their personal assets or place them in a blind trust prior to taking office.³¹ Additionally, possible emolument issues have been preempted by the Foreign Gifts and Decorations Act, which largely provides congressional acceptance of small gifts.³² The Foreign Emoluments Clause prohibits receipt of emoluments from foreign governments unless approved by Congress.³³ The Foreign Gifts and Decorations Act automatically provides congressional approval of the Foreign Emoluments Clause for gifts of \$390 or less.³⁴

Generally, past presidents have been extremely careful to avoid even the mere appearance of violating the Clauses.³⁵ Prior to his inauguration, President Trump seemed to act in accordance with past presidents when he announced that he would turn over management

29. See Marimow et al., *supra* note 12.

30. Seth Barrett Tillman, *The Foreign Emoluments Clause – Where the Bodies Are Buried: “Idiosyncratic” Legal Positions*, 59 S. TEX. L. REV. 237, 238–39 (2017) [hereinafter *Foreign Emoluments Clause*].

31. See Harris, *supra* note 11. But see Jennifer Wang, *Why Trump Won’t Use A Blind Trust and What His Predecessors Did with Their Assets*, FORBES (Nov. 15, 2016, 9:00 AM), <https://www.forbes.com/sites/jenniferwang/2016/11/15/why-trump-wont-use-a-blind-trust-and-what-his-predecessors-did-with-their-assets/#3e150f8629c0> [https://perma.cc/6Q3W-CPVL] (discussing that placing Trump’s assets into a blind trust is possible, yet there are difficulties presented by the nature of Trump’s assets).

32. 5 U.S.C. § 7342 (2012); see also Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 639 (2017).

33. U.S. CONST. art. I, § 9, cl. 8.

34. 5 U.S.C. § 7342 (a)(3), (a)(5), (b)(2), (c)(1)(A) (2012); see also *Foreign Gifts*, U.S. GEN. SERVICES ADMIN., <https://www.gsa.gov/policy-regulations/policy/personal-property-management-policy/foreign-gifts> [https://perma.cc/U9P9-DJZR] (last reviewed Mar. 21, 2018).

35. Michelle Ye Hee Lee, *Fact-Checking What Donald Trump’s Lawyer Said About the President-Elect’s Finances*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/12/fact-checking-claims-by-donald-trumps-lawyer/?utm_term=.86add6d191df [https://perma.cc/3PNL-P5GK] (quoting Randall Eliason). For example, President Theodore Roosevelt won the Nobel Peace Prize while in office but waited to accept the medal as well as the money until he was no longer president. Ronald D. Rotunda, *Everything, Anything, Is an Emolument*, JUSTIA (Jan. 30, 2017), <https://verdict.justia.com/2017/01/30/everything-anything-emolument> [https://perma.cc/5689-HAK5].

of the Trump Organization to his two eldest sons.³⁶ However, many members of Congress and a large portion of the electorate contend that the President's actions are not sufficient to protect the presidency from corruption and undue influence.³⁷

B. *The Resurgence of the Emoluments Clauses*

President Trump was first and foremost a businessman,³⁸ and several parties in lawsuits against Trump argue that he still has his fingers in the Trump Organization's business exploits and is thus benefitting from those exploits both here in the U.S. and abroad in violation of the Clauses.³⁹ In *District of Columbia v. Trump*, the Maryland Attorney General and D.C. Attorney General alleged that Trump, through his and the Trump Organization's ownership of the Trump International Hotel (the Hotel) in Washington, D.C., violated the Clauses by either directly or indirectly accepting payments from foreign and domestic governments.⁴⁰

While President Trump does not actively manage the Hotel, he continues to own and control it, including its bar, restaurant, and event spaces.⁴¹ This means that the President, either actually or potentially, directly or indirectly, shares in the profits that the Hotel and its amenities acquire.⁴² President Trump tried to avoid the legal

36. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 878 (D. Md. 2018); see also Sharon LaFraniere, *In Ruling Against Trump, Judge Defines Anticorruption Clauses in Constitution for First Time*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/us/politics/trump-emoluments-lawsuit.html> [<https://perma.cc/A33F-PBVT>].

37. See *Trump*, 315 F. Supp. 3d at 878–80; see also Second Amended Complaint at 1, 4–7, 59–60, 62, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-RA) (providing information of plaintiffs and alleging violations of Emoluments Clause); see also Andrew M. Harris & Daniel Flatley, *Congressional Democrats Can Sue Trump over Emoluments*, JUDGE SAYS, BLOOMBERG (Sept. 28, 2018, 4:57 PM), <https://www.bloomberg.com/news/articles/2018-09-28/congressional-democrats-can-sue-president-over-emoluments> [<https://perma.cc/DBP6-JH7L>].

38. See *Donald J. Trump*, WHITE HOUSE, <https://www.whitehouse.gov/people/donald-j-trump/> [<https://perma.cc/AFN8-HFYR>] (last visited Dec. 18, 2019).

39. See *Trump*, 315 F. Supp. 3d at 878–80; see Harris & Flatley, *supra* note 37. Two other suits were filed in addition to *District of Columbia v. Trump*, claiming Trump violated the Foreign Emoluments Clause: *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50–51 (D.D.C. 2018) and *Citizens for Responsibility & Ethics in Washington*, 276 F. Supp. 3d at 181.

40. *Trump*, 315 F. Supp. 3d at 877, 906–07.

41. *Id.* at 878 (discussing undisputed facts).

42. *Id.*

consequences of this conduct by turning over management of the Trump Organization to his two eldest sons and providing that all profits from foreign governments would be donated to the United States Treasury.⁴³ However, by the end of 2017, the Trump Organization claimed to have donated only \$151,470 in February of the same year without providing further details.⁴⁴ Additionally, President Trump created a trust to hold his business assets,⁴⁵ but he seems to be able to obtain distributions from that trust at any time.⁴⁶

In *Trump*, the District Court for the District of Maryland determined that: (1) the textual interpretation, (2) the original public meaning and purpose of the Clauses, and (3) the practice and precedent of the Executive Branch supported the finding that the presidency is subject to the Clauses' restrictions.⁴⁷ The court also held that emolument is to be defined broadly, including "any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments."⁴⁸ With these determinations, the court held that the President's continued entanglement and access to profits from the Hotel, where domestic, federal, and foreign leaders have visited and spent large sums of money, constituted a violation of both Clauses.⁴⁹ One contention with the district court's determination of what constitutes an emolument is that it raises questions as to the consistency in the application and enforcement of the Clauses to prior presidents.⁵⁰

43. *Id.*; see also Rotunda, *supra* note 35.

44. Marimow et al., *supra* note 12.

45. A document filed with an alcohol board in Washington, D.C. revealed that Trump's interest in the historic post office building, which was rebuilt by Trump into one of his luxury hotels, has been transferred into a revocable trust. Jill Disis, *What We Know, and Don't, About Trump's Trust*, CNN (Feb. 8, 2017, 8:13 AM), <https://money.cnn.com/2017/02/08/news/trump-trust-what-we-know/index.html> [<https://perma.cc/JE9Y-XLFC>]. "One created 'to hold assets for the exclusive benefit' of Trump." *Id.* (quoting Letter from Stephen J. O'Brien, Partner, Mallios & O'Brien PLLC, to D.C. Alcoholic Beverage Control Bd. (Jan. 27, 2017), assets.documentcloud.org/documents/3442581/Trump-International-Hotel-Liquor-License-Filings.pdf [<https://perma.cc/5JSP-JF3C>]). Donald Trump Jr. and Trump Organization executive Allen Weisselberg were the appointed trustees, whom Trump can remove at any time. *Id.*

46. See *Trump*, 315 F. Supp. 3d at 879.

47. *Id.* at 883–85.

48. *Id.* at 904.

49. *Id.* at 905–06.

50. See *infra* Section II.C.

C. *The Emoluments Clauses and Past Presidents*

Considering prior presidents, it is evident that the district court's definition of emolument has not been consistently applied.⁵¹ For example, the Clauses were not applied to George Washington when he bought land from the federal government during his term as President.⁵² If the Clauses, particularly the Domestic Emoluments Clause, precluded business transactions, then President Washington would have violated the Clause.⁵³ Another example is President Jimmy Carter.⁵⁴ President Carter placed his peanut farm and other assets into a blind trust, yet his own attorney was the trustee—not someone who is exactly at arms-length and independent.⁵⁵ Finally, there is President Barack Obama, who received the Nobel Peace Prize (an item of value⁵⁶) during his presidency in 2009.⁵⁷ At that time, the Office of Legal Counsel instructed President Obama that he could accept the Nobel Peace Prize without violating the Clauses.⁵⁸ However, when President Theodore Roosevelt won the Nobel Peace Prize in 1906,⁵⁹ he waited until after his presidency to accept the medal and prize money.⁶⁰

51. See Seth Barrett Tillman, *Business Transactions and President Trump's "Emoluments" Problem*, 40 HARV. J.L. & PUB. POL'Y 759, 761–67 (2017); see also Bobby R. Burchfield, *Ethics in the Executive Branch: The Constitutional, Statutory, and Ethical Issues Faced by the Ethics Advisor to a President Holding Immense Wealth*, 22 TEX. REV. L. & POL. 265, 272, 276–77, 281 (2017); see also Rotunda, *supra* note 35.

52. Burchfield, *supra* note 51, at 272; see also Tillman, *supra* note 51, at 761–67.

53. See Burchfield, *supra* note 51, at 272; see also Tillman, *supra* note 51, at 761–67.

54. Burchfield, *supra* note 51, at 276–77.

55. *Id.*

56. "The Nobel [Peace] Prize comes with a diploma, medal, and cash award." Anne Marie Helmenstine, *How Much Is the Nobel Prize Worth?*, THOUGHTCO., <https://www.thoughtco.com/monetary-value-of-the-nobel-prize-608598> [<https://perma.cc/7C83-BMFX>] (last updated Nov. 20, 2018). The Nobel Medal itself "is 18 karats green gold plated with 24 karats (pure) gold." *Id.* "The modern Nobel Prize medal is worth in excess of \$10,000[.]" *Id.* The cash prize awarded to President Obama was about \$1.4 million, which he donated to various charities. Helene Cooper, *Obama Lists Who Will Get Prize Money from Nobel*, N.Y. TIMES (Mar. 11, 2010), <https://www.nytimes.com/2010/03/12/us/12nobel.html> [<https://perma.cc/5HBU-ZM68>].

57. *The Nobel Peace Prize for 2009*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/2009/press-release/> [<https://perma.cc/EYU8-PT9Z>] (last visited Dec. 18, 2019).

58. Rotunda, *supra* note 35.

59. *The Nobel Peace Prize 1906*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/1906/summary/> [<https://perma.cc/6PGE-4P57>] (last visited Dec. 18, 2019).

60. Rotunda, *supra* note 35.

Scholarly articles discussing the allegations of Emoluments violations against Trump argue that such discrepancies mean either: (1) the Clauses were not meant to apply to the presidency, or (2) emolument has a narrower definition than what the court held in *Trump*.⁶¹ These scholars question why the Clauses would apply to the presidency or why emolument would have such a broad meaning if the very men who wrote the constitutional provision did not apply it to President Washington,⁶² and such a broad interpretation would prevent wealthy men such as themselves, with extensive business interests, from holding public office.⁶³ What is marginalized by these arguments, however, is that the historical purpose and intent of the framers is just one method by which to interpret the Clauses.⁶⁴ It is too simplistic to interpret the terse language of the Constitution using only one method of interpretation.⁶⁵

III. ANALYZING THE DISTRICT COURT'S HOLDING

A. *Analytical Textualism, Legal Realism, and Our Common Law System*

Using only the historical, semantic, public meaning to decipher the meaning of a legal text, such as the Constitution, leans towards an originalist method of interpretation.⁶⁶ Originalists believe that constitutional text should be given the original public meaning it would have had at the time it became law.⁶⁷ However, it has been found that formal originalist interpreters, such as those likely to criticize the court's determination,⁶⁸ tend to "pragmatically enrich"

61. See Grewal, *supra* note 32, at 641–42 (arguing that emolument is defined too broadly and the correct definition is only the compensation one receives for the personal performance of services as an officer or employee); see also *Foreign Emoluments Clause*, *supra* note 30 (arguing that the Foreign Emoluments Clause does not apply to the presidency, rather it only reaches appointed federal officials).

62. Burchfield, *supra* note 51, at 272; Tillman, *supra* note 51, at 761–67.

63. Burchfield, *supra* note 51, at 281.

64. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 886–904 (D. Md. 2018) (the court looked to the text of the Clauses, the original public meaning of emolument, the constitutional purpose of the Clauses, and the Executive Branch precedent and practice in defining emolument).

65. See Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 4 (2018).

66. Steven G. Calabresi, *On Originalism and Liberty*, 2015–2016 CATO SUP. CT. REV. 17, 18.

67. *Id.*

68. See Burchfield, *supra* note 51, at 272, 281; see also Tillman, *supra* note 51, at 761–67.

the text of the Constitution.⁶⁹ In other words, originalist interpreters often supplement the meaning of a word to reflect their own preferred policy positions.⁷⁰ Therefore, one must adopt an analytical textualist⁷¹ approach to interpret legal text, like the Clauses, with respect to the entire Constitution; not separated into a term by term analysis.⁷²

Looking at the Clauses within the context of the entire Constitution reveals that a textual analysis goes against a narrow interpretation of emolument.⁷³ For instance, it follows that an asserted meaning should not be cancelled out or contradicted by another portion of the Constitution.⁷⁴ Therefore, when President Trump argued to the court for a narrower interpretation of emolument, stating that it only refers to “a payment made as compensation for official services,” or, in other words, bribery, the court found his argument unconvincing.⁷⁵ The court determined that to accept the President’s definition of emolument to mean bribery would be repetitive because bribery is addressed elsewhere in the Constitution.⁷⁶ Additionally, the purpose behind instituting the Clauses, to prevent undue influence, is another interpretation method that further justifies the court’s holding that the Clauses apply to the President and that emolument may be broadly defined.⁷⁷ In its consideration of emolument, the court took into account several methods while interpreting the Clauses, such as the text and purpose of the Clauses.⁷⁸ Thus, the court’s broad definition of emolument is sound.⁷⁹

Finally, given the fact that it has been over two hundred years since the Clauses’ inception, it can be argued that globalization and the

69. See Nourse, *supra* note 65, at 2, 10–13.

70. See *id.*

71. Analytical textualism is an interpretation method proffered by Nourse, who contends that in interpreting the Constitution, one cannot just pull single words out of context and put them in a newer context in order to create a meaning. *Id.* at 10. Rather, one must ensure that the asserted meaning is not “inconsistent with the rest of the Constitution.” *Id.* at 10–11.

72. *Id.*

73. *Id.* at 31.

74. *Id.* at 10–11.

75. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 887 (D. Md. 2018).

76. *Id.* at 897.

77. *Id.* at 904; see also *supra* notes 26–29 and accompanying text.

78. *Trump*, 315 F. Supp. 3d at 886–904.

79. See Nourse, *supra* note 65, at 10 (“If there is more than one implication, the interpreter must engage in constitutional ‘construction,’ based on traditional pluralist interpretive tools.”).

general advancement of people and technology has made those in positions of power, such as the President, more susceptible to various influences than they were in the 1700s when the Clauses were instituted.⁸⁰ Accordingly, from a legal realist perspective⁸¹ and under our common law system, “there is a legitimate role for judgments about things like fairness and social policy.”⁸² So, while precedent is important and does limit the outcome a judge may reach in our common law system,⁸³ a judge may also consider whether the same rule or formulation makes sense in the current social context.⁸⁴ Consequently, the court’s determination that emolument has a broad definition of “any profit, gain, or advantage, of more than *de minimis* value, received by him, directly or indirectly, from foreign, the federal, or domestic governments” is a reasonable one.⁸⁵

B. *What’s the Issue?*

While the court’s holding regarding the scope and meaning of the Clauses is reasonable,⁸⁶ the issue is that there are inconsistencies in dealing with interests that may turn into conflicts issues for a president under the Clauses.⁸⁷ Future presidents should be able to consistently determine whether their private interests will raise a conflicts issue and how to address these potential conflicts.⁸⁸

An efficient method of preventing undue influence and conflicts of interest is to sort them out and address them before they become issues under the Clauses.⁸⁹ As stated in Part II above, often

80. See generally Castells, *supra* note 1, at 38 (stating that new information and technologies allow anyone and anything throughout the world to connect).

81. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, in *THE PHILOSOPHY OF LAW* 62–69 (Christopher P. Klein et al., eds., 1996) (stating that one cannot ignore what is written down, but that rules are malleable; one’s interpretation must make sense and be well reasoned given the circumstances under examination).

82. David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. (Sept. 27, 2010), <https://www.law.uchicago.edu/news/living-constitution> [https://perma.cc/6YA8-J5JC].

83. See Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STAN. ENCYCLOPEDIA PHIL. (June 20, 2006), <https://plato.stanford.edu/entries/legal-reas-prec/#Pre> [https://perma.cc/FWB5-8CX6].

84. Strauss, *supra* note 82; see also Kennedy, *supra* note 81.

85. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 905 (D. Md. 2018); see *supra* notes 80–84 and accompanying text.

86. See *supra* Section III.A.

87. See *supra* Section II.C.

88. See *infra* Section IV.A.

89. See *infra* Section IV.A.

presidents will put their assets into a blind trust to avoid an Emoluments issue.⁹⁰ For instance, President Jimmy Carter moved his peanut farm and other assets into a (not-so-blind) blind trust.⁹¹ Similarly, President Trump moved his assets into a trust, but one that he is seemingly still able to access.⁹² President Carter was found to not be in violation of the Clauses, yet the district court has taken issue with President Trump.⁹³ Thus, it appears that placing assets into a “blind trust” is not the best way to proactively address possible Emoluments issues.⁹⁴

A line regarding emoluments has finally been drawn by a federal court,⁹⁵ but the line is not necessarily stationary and may be subject to movement given current policies.⁹⁶ It should not be the President’s job alone to determine where this line is—that is where executive agencies come in.⁹⁷ With Trump’s current situation,⁹⁸ however, it seems that executive agencies, particularly the Office of Government Ethics (OGE), have clashed with the President regarding possible conflicts issues.⁹⁹ To establish a more effective process to adequately address conflicts of interest, this Comment proffers a solution to ensure the OGE remains capable of assisting the President in addressing and properly resolving conflicts issues before charges of an Emoluments violation arise.¹⁰⁰

IV. MOVING FORWARD

A. *The OGE as It Is and How It Could Be*

Currently, one of the duties of the OGE is to provide leadership and oversight of the Executive’s ethics program, and to *prevent* and resolve conflicts of interest.¹⁰¹ In pursuing this duty, the OGE is responsible for “monitoring agency compliance with executive

90. See *supra* Part II; see also Harris, *supra* note 11.

91. Burchfield, *supra* note 51, at 276–77.

92. See *supra* notes 45–46 and accompanying text.

93. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 879 (D. Md. 2018); see also Burchfield, *supra* note 51, at 276–77.

94. See Burchfield, *supra* note 51, at 278.

95. *Trump*, 315 F. Supp. 3d at 904; see also *Foreign Emoluments Clause*, *supra* note 30, at 238–39.

96. See Kennedy, *supra* note 81; see *supra* Section II.C; see also Strauss, *supra* note 82.

97. See *About OGE*, *supra* note 16.

98. See *Trump*, 315 F. Supp. 3d 875.

99. See *infra* Section IV.A.

100. See *infra* Part IV.

101. *About OGE*, *supra* note 16.

branch ethics program requirements.”¹⁰² The head of the OGE is the OGE Director, who is appointed to a five-year term by the President and confirmed by the Senate.¹⁰³ This Comment proposes that the power to appoint the OGE Director should be reallocated from the President to Congress.¹⁰⁴ Moving the appointment and approval of the OGE Director to Congress will better ensure that an objective, at arms-length individual oversees and prevents conflicts of interest within the Executive Branch.¹⁰⁵

Congressional appointment of the OGE Director is a viable solution considering that the OGE made headlines after Trump’s election due to public clashing between the Trump Administration and the OGE under former OGE Director Walter Shaub, who later resigned.¹⁰⁶ Shaub’s resignation followed various disagreements regarding President Trump’s global business empire, specifically Shaub’s finding that President Trump’s intent to “retain financial interests in the Trump Organization . . . ‘doesn’t meet the standards’ of . . . four decades of previous presidents.”¹⁰⁷

Trump proceeded to appoint David Apol as acting OGE Director, overstepping the natural line of succession in which the deputy director becomes the acting director.¹⁰⁸ While Apol has a long history of being involved in government ethics,¹⁰⁹ President Trump’s decision was concerning to some, including former OGE Director Shaub and Larry Noble, general counsel for the Campaign Legal Center, a nonprofit, nonpartisan ethics watchdog organization.¹¹⁰ Apol’s appointment as OGE Director was troubling because it raised the question of whether Apol was selected under the Trump

102. *Mission and Responsibilities*, U.S. OFF. GOV’T ETHICS, <https://www.oge.gov/Web/OGEnsf/Mission%20and%20Responsibilities> [https://perma.cc/PG6V-A3GG] (last visited Dec. 18, 2019); see also *infra* notes 113–26 and accompanying text.

103. *Office of the Director*, U.S. OFF. GOV’T ETHICS, <https://www.oge.gov/Web/OGEnsf/Organization/Office%20of%20the%20Director> [https://perma.cc/PG6V-A3GG] (last visited Dec. 18, 2019).

104. See *infra* notes 105–44 and accompanying text.

105. See *infra* Section IV.C.

106. See Meredith Somers, *Trump Taps Career Ethicist for Acting OGE Director*, FED. NEWS NETWORK (July 21, 2017, 12:42 PM), <https://federalnewsnetwork.com/management/2017/07/trump-taps-career-ethicist-for-acting-oge-director/> [https://perma.cc/37VR-W9HZ].

107. Julie Bykowitz, *Government Ethics Director Who Prodded Trump Resigns*, AP NEWS (July 6, 2017), <https://www.apnews.com/2fcf378cfc4540018b4905d590e4f933> [https://perma.cc/37VR-W9HZ].

108. Horowitz & Alesci, *supra* note 18.

109. Somers, *supra* note 106 (stating that Apol is a thirty-year OGE veteran).

110. Horowitz & Alesci, *supra* note 18.

Administration's belief that he would be more lenient.¹¹¹ By moving the appointment power to Congress, the President is guaranteed more objective feedback regarding potential conflicts from an independent ethicist.¹¹²

Another troubling aspect of President Trump's transition into office is the recent news reports regarding another executive agency: the General Services Administration (GSA).¹¹³ The GSA is an independent agency that, amongst other things, manages and leases government buildings.¹¹⁴ The recent news reports state that the GSA admitted that they chose to exclude possible Emoluments violations when they continued to lease the old post office building to President Trump for the Hotel¹¹⁵ (i.e., the building giving rise to alleged Emoluments violations in *Trump*).¹¹⁶ Ultimately, when President Trump was elected it was the responsibility of the GSA to decide whether President Trump would be able to keep the lease.¹¹⁷ The GSA released a forty-seven page report that stated "all" attorneys agreed early on that there was a possible violation of the Clauses.¹¹⁸ Yet, the attorneys decided to overlook those constitutional issues without preparing documentation as to the rationale for their decision to ignore possible Emoluments violations.¹¹⁹

Where was the OGE during President Trump's transition into office and this oversight by the GSA?¹²⁰ The OGE's responsibilities include oversight of executive agencies to ensure that they follow ethics protocol.¹²¹ During this transition period, the then-OGE Director Shaub was being shouldered out by the incoming

111. *Id.*

112. *See infra* text accompanying notes 149–61.

113. *See* Andrew Desiderio, *Watchdog: GSA Ignored Constitution on Trump D.C. Hotel Lease*, POLITICO (Jan. 16, 2019, 5:15 PM), <https://www.politico.com/story/2019/01/16/watchdog-gsa-ignored-emoluments-trump-hotel-lease-1106581> [<https://perma.cc/3CEB-BRPM>]; *see also* Charles S. Clark, *Watchdog: GSA Ignored Ethics Advice on Constitutionality of Trump Hotel Lease*, GOV'T EXECUTIVE (Jan. 16, 2019), <https://www.govexec.com/management/2019/01/watchdog-gsa-ignored-ethics-advice-constitutionality-trump-hotel-lease/154234/> [<https://perma.cc/Y6XS-93TG>].

114. *See Government Property for Sale or Disposal*, U.S. GEN. SERVICES ADMIN., <https://www.gsa.gov/buying-selling/government-property-for-sale-or-disposal> [<https://perma.cc/9UDC-8VXH>] (last updated Jan. 19, 2018).

115. *See* sources cited *supra* note 113.

116. *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 877 (D. Md. 2018).

117. *See* Desiderio, *supra* note 113.

118. *Id.*

119. *Id.*

120. *See infra* text accompanying notes 122–23.

121. *Mission and Responsibilities*, *supra* note 102.

President.¹²² The overlap in timing of these events indicates that OGE oversight and procedure for evaluating and preventing conflicts in the Executive Branch needs work to fulfill the intent and purpose of the Clauses.¹²³ A change needs to be made within the OGE.¹²⁴ Moving the OGE Director appointment to Congress will further guarantee an objective, independent ethicist as OGE Director.¹²⁵ Therefore, when red flags emerge regarding potential Emoluments violations, they are adequately addressed and reported rather than swept under the rug.¹²⁶

B. *The Criticism: Separation of Powers*

A likely criticism of moving the power to appoint the OGE Director from the President to Congress is that such a move would pose a separation of powers problem.¹²⁷ The separation of powers divides responsibility amongst the three branches of government with the intent of preventing the concentration of power in any one branch and providing for checks and balances.¹²⁸ With the rapid growth and complexity of our government, regulatory authority has necessarily been delegated from Congress to the Executive Branch through the establishment of executive and independent agencies.¹²⁹ The Supreme Court has declared that such delegation, through enabling acts, is constitutionally permissible.¹³⁰

Thus, delegation of congressional authority to executive agencies has occurred for decades and has effectively been concentrated into a

122. See *supra* notes 106–11 and accompanying text.

123. See *supra* Section II.A (stating the purpose of the Clauses is to prevent corruption of the presidency and ensure the president remains independent from influence).

124. See *supra* notes 106–19 and accompanying text.

125. See discussion *infra* Section IV.C.

126. See Desiderio, *supra* note 113; see also Horowitz & Alesci, *supra* note 18 (reporting on the concern that Trump appointed OGE acting director Apol in hopes that he would go easier on the Trump Administration).

127. See *infra* notes 131–36 and accompanying text.

128. *Separation of Powers – An Overview*, NAT’L CONF. ST. LEGISLATURES (May 1, 2019), <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> [https://perma.cc/E3G9-6Z26].

129. “In our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” Legal Info. Inst., *Delegation of Legislative Power*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/article-1/section-1/delegation-of-legislative-power#fn57> [https://perma.cc/DAH8-F2L7] (last visited Dec. 18, 2019) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

130. *Mistretta*, 488 U.S. at 372, 374; *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

“fourth branch of government”¹³¹ with executive oversight.¹³² Because regulatory authority has been granted to agencies by Congress and such transfer of power has been approved by the Supreme Court,¹³³ efforts to pull that power away from the Executive Branch and push it back towards the Legislative Branch will likely disrupt our governmental system.¹³⁴ Moving the appointment power of the OGE Director may not only imbalance the separation of powers as it has existed since the early twentieth century¹³⁵ but will also further handicap Congress by overloading it with too many responsibilities.¹³⁶

However, this criticism does not fully account for the purposes and goals of our American democracy.¹³⁷ The separation of powers is deeply rooted in our democracy and aids not only in preventing tyranny,¹³⁸ but also in providing a system of checks and balances.¹³⁹ This system provides us with democratic accountability, which is “fundamental to American constitutionalism.”¹⁴⁰

C. Congress Needs to Take Its Power Back

Moving the appointment power of the OGE Director from the President to Congress does not constitute a separation of powers

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131. Elisabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, HERITAGE FOUND. (May 7, 2015), https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and#_ftn10 [<https://perma.cc/7P7T-C2HM>].
 132. Mike Lee, U.S. Senator for Utah, *How Can Congress Reassert Control Over Federal Agencies?* (May 18, 2017), <https://www.lee.senate.gov/public/index.cfm/2017/5/how-can-congress-reassert-control-over-federal-agencies> [<https://perma.cc/VG5U-GQWY>]; see *Mistretta*, 488 U.S. at 372, 374; see also *Wayman*, 23 U.S. at 42–43.
 133. *Mistretta*, 488 U.S. at 372, 374; *Wayman*, 23 U.S. at 42–43; Legal Info. Inst., *supra* note 129.
 134. See *Mistretta*, 488 U.S. at 372, 374; see *Wayman*, 23 U.S. at 42–43; see Legal Info. Inst., *supra* note 129.
 135. But see Lee, *supra* note 132 (arguing against President Franklin Roosevelt’s adjustment of the separation of powers through the establishment of agencies following the Depression).
 136. See Legal Info. Inst., *supra* note 129.
 137. See *infra* notes 138–40 and accompanying text.
 138. THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).
 139. See *Separation of Powers – An Overview*, *supra* note 128.
 140. WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 23 (6th ed. 2018).

issue.¹⁴¹ Congress delegated this power to the Executive Branch and thus should have the ability to take that power back, especially when it is being misused.¹⁴² Although government growth has necessitated some degree of congressional delegation,¹⁴³ Congress cannot turn a blind eye to the misuse of a power that traditionally belonged to the Legislative Branch.¹⁴⁴ The separation of powers exists to prevent too much power from being concentrated in one branch of government.¹⁴⁵ Over time, Congress has grown too lenient in its abdication of its power and responsibility.¹⁴⁶ This has led the Executive Branch, and the administrative agencies within it, to garner greater power and influence.¹⁴⁷ The degree of power and influence that has landed in the Executive's lap was not constitutionally intended and alone constitutes a separation of powers issue.¹⁴⁸

The overstep of power and influence can be seen in the public clash between President Trump and former OGE Director Walter Shaub.¹⁴⁹ As discussed above, Shaub was effectively shouldered out due to disagreements regarding President Trump's continued interests in the Trump Organization.¹⁵⁰ Shaub's replacement, Apol, was allegedly chosen because of potential partiality towards President Trump and his Administration—illustrating the troubling displacement of power between the Executive and Legislative Branches.¹⁵¹ By moving the power to appoint the OGE Director to Congress, the balance of power between these two branches of government will realign and “check” the overgrown power of the Executive Branch—better ensuring that an impartial OGE Director is appointed.¹⁵²

141. See *infra* notes 142–48 and accompanying text.

142. See Somers, *supra* note 106; see also Bykowicz, *supra* note 107.

143. Legal Info. Inst., *supra* note 129.

144. See FUNK ET AL., *supra* note 140 (discussing how accountability is at the heart of our democratic government); see also Bykowicz, *supra* note 107; see also Somers, *supra* note 106.

145. *Separation of Powers – An Overview*, *supra* note 128.

146. See Lee, *supra* note 132; see also Pascal-Emmanuel Gobry, *This Is How Congress Can Take Back Power*, WEEK (Feb. 5, 2016), <https://theweek.com/articles/603522/how-congress-take-back-power> [<https://perma.cc/EZ2D-WP4N>].

147. See Lee, *supra* note 132; see also Gobry, *supra* note 146.

148. See THE FEDERALIST NO. 47 (James Madison); see also Lee, *supra* note 132.

149. See Somers, *supra* note 106; see also Bykowicz, *supra* note 107.

150. See Somers, *supra* note 106; see also Bykowicz, *supra* note 107.

151. See Horowitz & Alesci, *supra* note 18.

152. See *supra* notes 145–48 and accompanying text. “Checks and balances, principle of government under which separate branches are empowered to prevent actions by other branches and are induced to share power.” *Checks and Balances*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/checks-and-balances>

Accountability is a foundational element of a democratic system of government.¹⁵³ Restoring the power of appointment to Congress will allow for greater accountability;¹⁵⁴ greater accountability in that the OGE will, to a certain degree, be overseen by Congress.¹⁵⁵ Furthermore, direct congressional oversight of the OGE Director's appointment will better ensure that a nonpartisan, independent ethicist is placed in that position.¹⁵⁶ A truly independent OGE Director will also increase accountability of the President and the Executive Branch by providing unbiased and objective review of potential conflicts.¹⁵⁷ An independent OGE Director will better permit consistent guidance for future presidents as to what constitutes an Emoluments issue and conflict of interest because those appointing the OGE Director will not be the ones whose private interests are monitored by the OGE Director.¹⁵⁸ Consequently, this removes the incentive to select an individual who may show partiality or turn a blind eye to potential conflicts.¹⁵⁹ Empowering the President to choose the individual in charge of evaluating their private interests is inherently flawed.¹⁶⁰ This flawed process of appointment casts serious doubt that an unbiased, independent, and objective individual is being appointed as the OGE Director.¹⁶¹ To guarantee a truly fair review, the OGE Director should be appointed by Congress.¹⁶²

V. CONCLUSION

In a decision handed down by the United States District Court for the District of Maryland in *District of Columbia v. Trump*, the court put a significant part of the arguments surrounding the scope and

[<https://perma.cc/S6TU-ENPN>] (last updated Aug. 26, 2019).

153. FUNK ET AL., *supra* note 140.

154. *See* Gobry, *supra* note 146; *see also* Horowitz & Alesci, *supra* note 18.

155. *See* Gobry, *supra* note 146 (“Ceding power to the executive branch is one way for members of Congress to avoid being held accountable for . . . decisions.”).

156. *See* Horowitz & Alesci, *supra* note 18.

157. *See id.* (suggesting that by selecting an OGE Director known for his “looser” interpretation of ethics rules, the President may have hoped to reduce accountability for ethical issues arising from the Executive Branch).

158. *See id.*; *see generally* Somers, *supra* note 106 (discussing the extensive power of the OGE Director position and the opposition to Apol’s appointment).

159. *See* Horowitz & Alesci, *supra* note 18.

160. *See id.*

161. *See id.*

162. *See supra* Section IV.C.

meaning of the Clauses to rest.¹⁶³ The issue that remains, given the court's broad definition of emolument, is how future presidents with vast private interests can better detect conflict of interest issues and address potential issues appropriately prior to an alleged Emoluments violation.¹⁶⁴ Currently, the OGE is headed by a Director appointed by the President;¹⁶⁵ a system that risks the President selecting an individual based on a belief that the appointee will show the President leniency.¹⁶⁶ The current appointment power of the OGE Director must be removed from the President and granted to Congress.¹⁶⁷ This movement of power is necessary to ensure an independent, objective, and arms-length ethicist is appointed as Director; one who can consistently and clearly identify conflicts of interest issues within the Executive Branch.¹⁶⁸ This movement of power will also rebalance the separation of powers to ensure that the overgrown power of the Executive Branch is "checked."¹⁶⁹

163. *See supra* Section II.B.

164. *See supra* Part IV.

165. *About OGE, supra* note 16.

166. *See* Horowitz & Alesci, *supra* note 18.

167. *See supra* Part IV.

168. *See supra* Section IV.C.

169. *See supra* Section IV.C.

